

**STATE OF MAINE  
DIRIGO HEALTH AGENCY**

IN RE: )  
REVIEW OF AGGREGATE )  
MEASURABLE COST SAVINGS )  
DETERMINED BY DIRIGO HEALTH )  
FOR THE SECONDASSESSMENT YEAR )  
(2007) )

**FILING COVER SHEET**

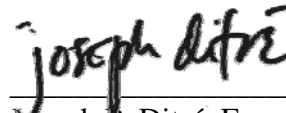
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*Advocating the right to health care  
for every man, woman and child.*

By U.S Mail and Electronically

March 24, 2006

IN RE: REVIEW OF AGGREGATE MEASURABLE COST SAVINGS DETERMINED BY  
DIRIGO HEALTH FOR THE SECONDASSSESSMENT YEAR (2007)

Dear Dr. McAfee and Ms. Therberge:

Please find enclosed for filing in the above captioned matter, the following documents from Consumers for Affordable Health Care. Please contact me with any questions.

1. Filing Cover Sheet
2. Pre-hearing Memorandum of Law of Consumers for Affordable Health Care

Thank you for your attention in this matter.

Respectfully submitted,

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STATE OF MAINE  
DIRIGO HEALTH AGENCY

IN RE:	)	
REVIEW OF AGGREGATE	)	<b>PRE-HEARING</b>
MEASURABLE COST SAVINGS	)	<b>MEMORANDUM OF LAW OF</b>
DETERMINED BY DIRIGO HEALTH	)	<b>CONSUMERS FOR AFFORDABLE</b>
FOR THE SECOND ASSESSMENT YEAR)	)	<b>HEALTH CARE</b>
(2007)	)	

Intervenor Consumers for Affordable Health Care (“CAHC”) submits the following as its Pre-hearing Memorandum of Law and reserves the right to submit further memoranda.

**BACKGROUND**

The Dirigo Health Act, P.L. 2003, Ch. 469, as amended by P.L. 2005, Ch. 400 (the Act’), established the Board to sponsor affordable health care for low-income Maine citizens with subsidies coming from annual assessments on insurers and third party administrators based on savings determined by the Board from initiatives to reduce costs in the health care system. The Act provides for the subsidies to be established through three distinct administrative stages: *first*, the Board each year determines the “aggregate measurable cost savings” in the health care system attributable to Dirigo Initiatives; *second*, that determination is subject to review by the Superintendent as to whether the savings found by the Board are reasonably supported by the evidence in the record; and *third*, the Board establishes a “savings offset payment” (“SOP”) to be assessed against insurers and third party administrators that may not exceed 4% of paid claims or the aggregate measurable cost savings as approved by the Superintendent. The SOP is then used to subsidize Dirigo insurance for income eligible insureds. We are at the first stage of the process.

*I. The Determination of the Aggregate Measurable Cost Savings Includes All Cost Savings Initiatives in the Dirigo Health Act.*

At the core of the mandate to the Board is the provision that it make a determination annually as to:

the aggregate measurable cost savings in this State,  
including any reduction or avoidance of bad debt and

charity care cost to health care providers as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004. 24-A M.R.S.A. §6913(1)

This statutory provision is unambiguous. The Board is charged with the responsibility of calculating “aggregate measurable cost savings” in this State, period. It is not limited to bad debt/charity care or increases in the enrollment of MaineCare just because the Legislature chose to mention these two measures in the statute. All the words after “*including any*” in the statute are simply examples or illustrations of the kind of costs savings to be measured, but not an exclusive list.

In their appeal of the Superintendent’s decision for the first assessment year, some of the intervenors to this proceeding made the argument to the Superior Court in Cumberland County that the entire cost savings are limited to the two savings in the subsection above. However, that argument ignores the plain meaning of the Act’s mandate to the Board. Under the Act, the Board is charged with determining:

the aggregate measurable cost savings in this State, *including any* reduction or avoidance of bad debt and charity care cost to health care providers as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004. 24-A M.R.S.A. §6913(1) [Emphasis added.]

In their appeals, and bears repeating here because of the methodologies presented in this proceeding, their interpretation was premised on two alternative assumptions, both of which are erroneous. The first is that the word “including” should be read as “meaning” so that all the words after “including” constitute an exclusive list of what may be considered in the calculation of “aggregate measurable cost savings.” Our Law Court has squarely rejected this exact argument. It has held that the plain meaning of the word “includes” is to provide an example or illustration, not an exclusive list. In the case of *S.D. Warren Co. v. Board of Environmental Protection*, *supra*, the Law Court interpreted the meaning of the word “includes” as used in the definition of “discharge”

in the federal Clean Water Act.<sup>1</sup> The Court stated that it would be guided by the plain, common and ordinary meaning of statutory language to effect legislative intent. *Id.*, 868 A. 2d at 216. Then it ruled that the “common definition of the word *includes* does not suggest it is a word of limitation,” citing in support the Supreme Court case of *Helvering v. Morgan’s Inc.*, 293 U.S. 121, 125-6 (1934)(“the verb ‘includes’ imports a general class, some of whose particular instances are those specified in the definition.”) Other courts have come to the same conclusion. *See, Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001)(the plain, dictionary meaning of “including” is to comprise part of a whole, meaning to be illustrative); *United States v. Whiting*, 165 F.3d 631, 633 (8<sup>th</sup> Cir. 1999)(“When a statute uses the word ‘includes’ rather than ‘means’ in defining a term, it does not imply that items not listed fall outside the definition.”); *Oregon Natural Desert Association v. Thomas*, 940 F.Supp. 1534, 1540 (D. Or. 1996) (“The term ‘including’ in the discharge definition permits additional, unstated meanings.”); *State of Maryland v. Wiegmann*, 714 A.2d 841, 845 (Md. Ct. App. 1998) (Ordinarily the word “including” means comprising by illustration and not by way of limitation.); and *Attorney General v. Huron County Road Comm.*, 538 N.W.2d 68, 72 (Mich. Ct. App. 1995) (the plain dictionary meaning of the word “includes” means to give examples that are not exclusive).

The second, alternatively erroneous assumption was to read the phrase “as a result of the operation of Dirigo” as modifying “aggregate measurable cost savings,” rather than the phrase “any reduction or avoidance of bad debt and charity care cost to health care providers.” Their reading of the statute depends upon the insertion of a comma after the word “providers” so that the dependent clause -- “including any reduction or avoidance of bad debt and charity care cost to health care providers” – can be elided out and the provision would read “aggregate measurable cost savings in this State ... as a result of the operation of Dirigo Health ...” However, the comma giving this meaning is simply not there.

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<sup>1</sup> The statutory phrase at issue was: “the term ‘discharge’ when used without qualification includes a discharge of a pollutant and a discharge of pollutants”.

## *II. The Dirigo Legislation Does Not Contemplate Netting.*

As a technical matter, the mandate of the Legislature to determine “aggregate measurable cost savings” does not contemplate netting. The plain meaning of “aggregate” means a “total considered with reference to its constituent parts; a *gross amount*.” *Dictionary.com*. [Emphasis added.] Moreover, when L.D. 1577 was being considered in 2005, the Minority Report of the House Insurance and Financial Services Committee (Amendment “B”, S-360) included an amendment to the proposed Section 6913(1) to read as follows:

**1. Determination of cost savings.** After an opportunity for a an adjudicatory hearing conducted pursuant to Title 5, chapter 375, subchapter 4, the ~~board~~ superintendent shall determine annually not later than ~~April~~ February the aggregate measurable cost savings in this State, including any reduction or avoidance of bad debt and charity care costs to health care providers ~~in this State~~ as a result of the operation of Dirigo Health and any net savings from increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.

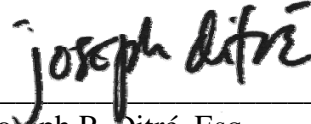
This amendment was defeated. It shows that when the Legislature considered the idea of “netting,” it said so in reference to a specific initiative. Netting was not considered embodied in the other words of the statute, including the word “aggregate.” If the Legislature, which was well aware of the concept of “netting,” wanted to apply it more broadly to all cost savings, it would have said so. It did not.

There is also a logical reason why netting should not be used. Assume a voluntary target goal in Dirigo legislation to reduce hospital COM from a historical 10% increase down to 5%. Assume 4 four hospitals of equal size in the state, all of which had COM increases of 10% for the last several years. Then assume one hospital responds to the voluntary target, reducing the increases of COM to 5%, whereas other hospitals remain at 10%. Under this example, if netting were used, there would be no savings because the three non-conforming hospitals would have exceeded the voluntary target by an aggregate of 15%, wiping out the one hospital that cut its COM in half and reduced by it to 5%. Yet clearly in this example, one of the hospitals did generate savings of 5% in

response to the legislation. Logically, therefore, netting savings in the hospital initiatives only makes sense if the negative is a cost that is identified as having been *caused by* the Dirigo Initiatives.

Dated: March 24, 2006

Respectfully submitted,

A handwritten signature in black ink that reads "joseph ditre". The signature is written in a cursive, lowercase style with a horizontal line underneath it.

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## Certificate of Service

I, Joseph P. Ditré, Esq., certify that the foregoing **Pre-hearing Memorandum of Law of Consumers for Affordable Health Care** were served this day upon the following parties via US Mail and electronically.

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Dated: March 24, 2006

A handwritten signature in black ink, reading "Joseph P. Ditré". The signature is written in a cursive style with a horizontal line extending from the end of the name.

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